Brett Andrew Macnamara v Kam Lee Kuan

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–2098 OF 2004
BALIA YUSOF J
22 DECEMBER 2007

Civil Procedure — Originating summons — Claim for possession — Application for vacant possession of matrimonial home under trust by beneficiary — Injunction against beneficiary from entering house — Whether relief for vacant possession should be heard by way of writ and not originating summons — Whether issue on construction of trust deed was highly contestable

Contract — Illegality — Public policy — Malaysian wife held property in trust for foreigner husband — Whether trust deed intended to circumvent government's policy of restricting foreign ownership of property — Contracts Act 1950 s 24

Land Law — Indefeasibility of title and interests — Registered owner — Defendant wife held property in trust for plaintiff husband — Whether defendant was a purchaser with actual notice of an unregistered interest of the plaintiff — Whether defendant's title was indefeasible — Whether order for vacant possession sought by plaintiff against defendant over trust property contravened s 340 of the National Land Code

Land Law — Restraint on dealings — Caveats — Failure to lodge a trust caveat — Whether a factor against beneficiary — National Land Code s 332

Trusts and Trustees — Illegality — Contravention of law — Malaysian wife held property in trust for foreigner husband — Whether illegal for being in contravention of the Foreign Investment Committee's guidelines

Trusts and Trustees — Trusts — Construction of trust deed — Malaysian wife held property in trust for foreigner husband — Whether words used were clear and unambiguous

The plaintiff an Australian, and the defendant a Malaysian, were married in Australia in 1997 and subsequently had their marriage registered in Malaysia

in 1999. In 2004 they were divorced. The plaintiff financed the purchase of a property, a single storey bungalow known as No 113, Jalan Chow Kai, Canning Garden, Ipoh, Perak ('the house') and had it registered in the name of the defendant. By a trust deed dated 5 May 1999, it was declared that the whole of the purchase price of the house was paid by the plaintiff and it was further declared that as consent in writing of the Foreign Investment Committee and the state authority of Perak were required for a foreigner to own property in Malaysia, the trust deed declared that the defendant held the property in trust of her husband, the plaintiff (beneficiary) until such time the plaintiff obtains the consent to register the same in the plaintiff's name. The trust deed further declared that upon obtaining the consent of the relevant authorities, the defendant will, at the request of the beneficiary transfer the property to the beneficiary or sell or transfer the same to such other person or otherwise deal with the property at such time and in such manner as the beneficiary shall direct.

In a separate proceeding via Saman Pemula No 24–168 of 2003 the defendant obtained an order of custody and maintenance of the child of their marriage and also an injunction against the plaintiff from entering the house until a further order was made. The order was made by consent of the parties. In Divorce Petition No 33–452 of 2003 filed by the plaintiff, a consent order was also entered into between the parties whereby the plaintiff withdrew his claim against the property without prejudice to his right to file a claim in another separate action against the defendant. According to the plaintiff this was done purely to expedite the divorce proceedings. The plaintiff now seeks an order declaring that the defendant holds the house in trust for him in accordance with the terms of the trust deed dated 5 May 1999 and for a further order of vacant possession and that he be allowed to re-enter the house and costs. The defendant objected on the following grounds: (1) while an application for declaration may be made by an originating summons, the relief for vacant possession sought by the plaintiff should be heard by way of a writ in view of the fact that the issue was highly contestable and that an injunction was still in force against the plaintiff; (2) the trust deed was intended to circumvent the government's policy of restricting foreign ownership of property and thus was in contravention of s 24 of the Contracts Act 1950; (3) the court was precluded from making any order for vacant possession as prayed by the plaintiff in this application because there was an injunction against him from entering the house; (4) the failure of the plaintiff to lodge a trust caveat under s 332 of the National Land Code ('the NLC') must be taken as factor against him; and (5) the defendant's title to the property was indefeasible.

Held, allowing the plaintiff's application:

(1) From the affidavits filed by the parties, the facts were quite simple and

straight forward and what was left for determination purely rests on the interpretation and construction of the trust deed dated 5 May 1999. The facts established in this case were not highly contestable at all. The filing of this application by way of originating summons was good in law (see para 4).

(2) The issue revolved on the construction of the trust deed. Upon construing the words of the trust deed, the intentions of the parties were clear. Not only the trust deed declared that the property was purchased by the plaintiff with his own money but it went on to declare that because of the pending approval and consent of the relevant authorities, namely the Foreign Investment Committee and the Perak State Authority, the property was to be held by the defendant in trust of the plaintiff. The trust deed also further declared that the defendant trustee shall transfer the property to the plaintiff upon approval by the authorities and that the trustee shall also deal with the property in such manner as the plaintiff shall direct. It was upon this understanding that the property was registered in the name of the defendant on 30 July 1999. The trust deed was executed on 5 May 1999 the very same day the property was purchased. They were done contemproneously (see para 10).

(3) When the words used were clear and unambiguous it was not the court's business to go behind those written terms or read new terms to it. There was not the slightest doubt about the intention of the parties. Both the plaintiff and the defendant were very conscious of the fact about the ownership of the property which was purchased on the very same day of the execution of the trust deed, and both knew their relative positions, one being the trustee and the other the beneficiary of the trust (see paras 13–14).

(4) On the facts the court was far from being satisfied that the defendant did not know about the trust deed which she had executed. It was inconceivable to suggest that she did not know or understand the nature of the trust deed (see para 18).

(5) The trust was not in contravention of the Foreign Investment Committee's guidelines. The ownership of the property was in the name of the defendant, a Malaysian citizen, and the clear words therein spelled out that she was holding it in trust of the plaintiff. What the parties did in the instant case was merely to facilitate the transfer of the property pending the approval of the authorities. The trust deed was not executed for an oblique purpose and neither was it a colourable device to deceive the authorities. There was nothing illegal about the execution of the trust deed in this case. What the plaintiff was seeking was merely for a declaration that he was the beneficiary of the trust. He was not asking for the transfer of ownership of the property.

A The trust so created was not a device to transfer the ownership of the property to the plaintiff who was a foreigner and prohibited by the guidelines. That being the case, the trust was a lawful and valid trust (see para 23).

B (6) As the consent order says, the restraint on the plaintiff was only until a further order was made, and this instant application afforded an instance for the making of such other order envisaged therein. It was entirely within the court's domain to make an order for vacant possession if the circumstances merit the making of such an order above C and over the declaratory order as prayed in this application (see para 24).

(7) That there was a private caveat on the land lodged by the plaintiff and the provisions of s 323 of the NLC entitled him to lodge the private D caveat being a person beneficially entitled under the trust. The plaintiff was the beneficiary of the trust and was laying his claim under it. He had an interest in the land (see paras 25–26).

(8) On the issue of indefeasibility, it was very clear that the defendant was the registered owner of the land and the preamble to the trust deed E declared that she was the purchaser of the land. The trust deed further declared that the plaintiff was the one who financed the purchase of the property and was the beneficiary of the trust. He therefore had an interest in the property. In fact, he was the beneficial owner of the property. Seen in that light, the defendant was a purchaser with actual F notice of an unregistered interest of the plaintiff. Equity should intervene in the circumstance, in favour of the plaintiff. As trustee, the defendant must strictly conform to and carry out the terms of the trust. It is also elementary that a trustee is a fiduciary and has an obligation towards the beneficiary as spelt out in the terms of the trust. The trustee G must, amongst others, deal with the property in such manner as the beneficiary shall direct (see para 32).

(9) An order for vacant possession sought by the plaintiff did not contravene s 340 of the NLC. It did not affect the title of the defendant H to the property and shall in no way be misunderstood to be giving ownership of the same to the plaintiff (see para 33).

[Bahasa Malaysia summary

I Plaintif seorang warganegara Australia, dan defendan seorang warganegara Malaysia, telah berkahwin di Australia pada tahun 1997 dan kemudiannya mendaftarkan perkahwinan mereka di Malaysia dalam tahun 1999. Dalam tahun 2004 kedua-duanya telah bercerai. Plaintif telah membantu membiaya kewangan dalam pembelian sebuah hartanah, iaitu sebuah banglo satu

tingkat yang dikenali sebagai No 113, Jalan Chow Kai, Canning Garden, Ipoh, Perak ('rumah') dan telah mendaftarkannya di atas nama defendan. Melalui suratikatan amanah bertarikh 5 Mei 1999, ia telah mengisytiharkan bahawa keseluruhan harga belian rumah akan dibayar oleh plaintif dan ia selanjutnya mengisytiharkan bahawa kebenaran bertulis Jawatankuasa Pelaburan Asing dan pihak berkuasa Perak adalah diperlukan untuk orang asing memiliki hartanah di Malaysia, suratikatan amanah mengisytiharkan bahawa defendan memegang hartanah sebagai amanah bagi pihak suaminya, plaintif (benefisiari) sehingga tempoh masa plaintif mendapatkan kebenaran mendaftarkannya di atas nama plaintif. Suratikatan amanah seterusnya mengisytiharkan bahawa setelah mendapat kebenaran daripada pihak berkuasa, defendan akan, atas permintaan benefisiari memindahmilik hartanah kepada benefisiari atau menjual atau memindahmilik kepada seseorang atau sebaliknya berurusan dengan hartanah pada masa itu dan dalam apa-apa keadaan sebagaimana yang dikehendaki oleh benefisiari.

Dalam prosiding berlainan melalui Saman Pemula No 24–168–2003 defendan telah mendapatkan satu perintah penjagaan dan nafkah anak hasil perkahwinan mereka dan juga satu injunksi terhadap plaintif daripada memasuki rumah sehingga perintah selanjutnya dibuat. Perintah tersebut dibuat atas persetujuan kedua-dua pihak. Dalam Petisyen Perceraian No 33–452–2003 yang difailkan oleh plaintif, perintah persetujuan juga dimasukkan antara pihak-pihak yang mana plaintif akan menggugurkan tuntutannya terhadap hartanah tanpa prasangka ke atas haknya untuk memfailkan tuntutan dalam tindakan berasingan terhadap defendan. Menurut plaintif ini dilakukan atas dasar untuk mempercepatkan prosiding perceraian. Plaintif ketika ini memohon satu perintah mengisytiharkan bahawa defendan memiliki rumah atas amanah kepadanya berdasarkan kepada terma-terma suratikatan amanah bertarikh 5 Mei 1999 dan untuk satu perintah selanjutnya bagi milikan kosong dan beliau dibenarkan untuk memasuki semula rumah dan kos. Defendan telah menentang atas alasan-alasan berikut: (1) walaupun satu permohonan untuk perisytiharan boleh dibuat melalui saman pemula, relief untuk milikan kosong yang dipohon oleh plaintif sepatutnya didengar melalui writ disebabkan isu-isu adalah amat tinggi untuk dipertikaikan dan bahawa injunksi masih berkuatkuasa terhadap plaintif; (2) suratikatan amanah diniatkan untuk menidakkan polisi kerajaan yang melarang pemilikan hartanah oleh warga asing dan oleh sebab itu melanggar s 24 Akta Kontrak 1950; (3) mahkamah dihalang dari membuat sebarang perintah untuk milikan kosong sebagaimana dipohon oleh plaintif dalam permohonan ini kerana terdapat injunksi terhadapnya daripada memasuki rumah; (4) kegagalan plaintif memasukkan kaveat amanah di bawah s 322 Kanun Tanah Negara ('KTN') hendaklah diambilkira sebagai faktor terhadapnya; dan (5) hakmilik defendan kepada hartanah tersebut adalah tidak boleh disangkal.

Diputuskan, membenarkan permohonan plaintif:

(1) Daripada afidavit-afidavit yang difailkan oleh pihak-pihak, fakta adalah amat ringkas dan mudah difahami dan apa yang tinggal untuk diputuskan sebenarnya terletak kepada interpretasi dan pentafsiran suratikatan amanah bertarikh 5 Mei 1999. Fakta-fakta yang dikemukakan dalam kes ini adalah sama sekali tidak begitu dipertikaikan. Pemfailan permohonan melalui saman pemula adalah betul dari segi undang-undang. (lihat perenggan 4).

(2) Isu berkisar kepada pentafsiran suratikatan amanah. Setelah mentafsirkan perkataan-perkataan suratikatan amanah, tujuan pihak-pihak adalah jelas. Bukan hanya suratikatan amanah mengisytiharkan bahawa hartanah dibeli oleh plaintif dengan wangnya sendiri tetapi ia juga mengisytiharkan bahawa oleh kerana menunggu kelulusan dan kebenaran daripada pihak-pihak berkuasa, iaitu Jawatankuasa Pelaburan Asing dan Pihak Berkuasa Negeri Perak, hartanah telah dipegang oleh defendan atas dasar amanah bagi pihak plaintif. Suratikatan amanah juga seterusnya mengisytiharkan bahawa pemegang amnah iaitu defendan hendaklah memindahmilik hartanah kepada plaintif setelah kelulusan oleh pihak-pihak berkuasa dan pemegang amanah hendaklah menguruskan hartanah dalam keadaan sebagaimana dikehendaki oleh plaintif. Berdasarkan kepada persefahaman ini bahawa hartanah didaftarkan di atas nama defendan pada 30 Julai 1999. Suratikatan telahpun dilaksanakan pada 5 Mei 1999 iaitu hari yang sama pembelian hartanah. Mereka telah dibuat secara bersesama (lihat perenggan 10).

(3) Apabila perkataan-perkataan yang digunakan adalah jelas dan tidak diragukan ia bukanlah urusan mahkamah untuk mentafsir sehalus-halusnya terma-terma bertulis atau membaca terma-terma baru kepadanya. Tiada ada sedikitpun keraguan berkenaan dengan tujuan pihak-pihak. Kedua-dua plaintif dan defendan sedar berkenaan fakta mengenai pemilikkan hartanah yang telah dibeli pada hari yang sama perlaksanaan suratikatan amanah, dan kedua-duanya mengetahui kedudukan masing-masing, seorang sebagai pemegang amanah dan seorang lagi sebagai benefisiari amanah (lihat perenggan 13–14).

(4) Fakta-fakta yang mana mahkamah masih belum berpuas hati adalah defendan tidak mengetahui mengenai suratikatan amanah yang telah beliau laksanakan. Ia memang sukar dipercayai bahawa beliau tidak mengetahui atau memahami keperluan suratikatan amanah (lihat perenggan 18).

(5) Suratikatan adalah tidak melanggar garispanduan Jawatankuasa Pelaburan Asing. Pemilikkan hartanah adalah atas nama defendan, warganegara Malaysia, dan perkataan-perkataan yang jelas di dalamnya

mengatakan bahawa beliau memegangnya atas amanah daripada plaintif. Apa yang dilakukan oleh pihak-pihak pada ketika itu semata-mata untuk memudahkan pindahmilik hartanah sementara menunggu kelulusan pihak-pihak berkuasa. Suratikatan amanah tidak dilaksanakan untuk tujuan yang serong dan bukan pula alat berwarna bagi memperdayakan pihak-pihak berkuasa. Tiada ada yang menyalahi undang-undang berkenaan perlaksanaan suratikatan dalam kes ini. Apa yang dipohon oleh plaintif hanyalah satu perisytiharan bahawa beliau adalah benefisiari amanah. Beliau tidak memohon untuk pindahmilik pemilikan hartanah. Amanah yang dibuat bukanlah alat untuk memindahmilik pemilikkan hartanah kepada plaintif yang merupakan seorang warga asing dan dilarang oleh garis panduan. Oleh yang demikian, amanah adalah mengikut undang-undang dan sah. (lihat perenggan 23).

(6) Sebagaimana dimuatkan dalam perintah persetujuan, sekatan ke atas plaintif adalah sehingga perintah selanjutnya dibuat, dan permohonan ketika ini memberi satu keadaan bagi membuat perintah lain yang boleh dijangkakan didalamnya. Ia adalah dalam bidang kuasa mahkamah sepenuhnya bagi membuat perintah milikan kosong jika keadaan-keadaan adalah bermerit untuk sebarang perintah selain perintah perisytiharan seperti yang dipohon dalam permohonan ini (lihat perenggan 24).

(7) Bahawa terdapat kaveat persendirian ke atas tanah yang telah dimasukkan oleh plaintif dan peruntukkan s 323 KTN membolehkan beliau memasukkan kaveat persendirian sebagai seorang yang berhak secara benefisial di bawah amanah. Plaintif adalah benefisiari kepada amanah dan mengemukakan tuntutannya dibawahnya. Beliau mempunyai kepentingan ke atas tanah. (lihat perenggan 25–26).

(8) Berkenaan isu ketakboleh sangkalan, ia adalah jelas bahawa defendan adalah pemilik berdaftar tanah dan mukadimah suratikatan amanah mengisytiharkan bahawa beliau adalah pembeli tanah tersebut. Suratikatan amanah seterusnya mengisytiharkan bahawa plaintif adalah merupakan orang yang membiayai kewangan pembelian hartnah dan juga benefisiari kepada amanah. Beliau oleh itu mempunyai kepentingan dalam hartanah. Sebenarnya, beliau adalah pemilik benefisial hartanah. Mellihat dari sudut itu, defendan adalah merupakan pembeli yang mempunyai pengetahuan tentang kepentingan plaintif yang belum didaftarkan. Kesaksamaan (equity) hendaklah mencampuri keadaan ini, iaitu di pihak plaintif. Sebagai pemegang amanah, defendan hendaklah secara ketat mengesahkan dan menjalankan terma-terma amanah. Ia juga merupakan asas bahawa pemegang amanah adalah fidusiari dan mempunyai kewajipan kepada benefisiari sebagaimana digariskan dalam terma-terma amanah.

Pemegang amanah mestilah, antara lain, menguruskan hartanah dalam keadaan sebagaimana yang dikehendaki oleh benefisiari (lihat perenggan 32).

(9) Perintah untuk milikan kosong yang dipohon oleh plaintif tidak menyalahi s 340 KTN. Ia tidak memberikan kesan kepada hakmilik defendan terhadap hartanah dan seharusnya tidah disalahertikan sebagai memberikan pemilikan tanah kepada plaintif (lihat perenggan 33).]

Notes

For a case on claim for possession, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 972.

For a case on construction of trust deed, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2307.

For a case on illegality generally, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2076.

For cases on caveats, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3480–3824.

For cases on public policy, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3695–3696.

For cases on registered owner, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2980–2983.

Cases referred to

Ahmad bin Omar v Haji Salleh bin Shaikh Osman [1987] 1 MLJ 338 (refd)

Barnard v National Dock Labour Board [1953] 2 QB 18 (refd)

Breskvar v Wall [1972] 46 ADR 68 (refd)

Central Bank of India v Hartford Fire Insurance Co Ltd 1965 AIR 1288 (refd)

Curtis v Chemical Cleaning and Dyeing Co Ltd [1951] 1 All ER 631 (refd)

Fusing Construction Sdn. Bhd v EON Finance Bhd & Ors [2000] 3 MLJ 95 (refd)

Frazer v Walker [1967] All ER 649 (refd) Gibbs v Messer [1891] AC 284 (refd)

Gibbs v Messer [1891] AC 284) (refd)

Haji Abdul Raman v Mohamed Hassan [1415] 1 FMSLR 290 (refd)

Ikebife Ibeneweka & Ors v Egbuna Peter & Anor [1964] 1 AMR 219 (refd)

Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64, (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/oSurian Singh & Ors, Interveners) [1996] 2 MLJ 431 (refd)

Lim Cho Hock v Government of the State of Perak & Ors [1980] 2 MLJ 149 (refd)

Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281 (refd)

Lo Su Tsoon Timber Duport v Southern Estate Sdn. Bhd [1971] 2 MLJ 161 (refd)

Ng Kum Hoy v Bank Bumiputra Malaysia Bhd [1990] 2 CLJ 69 (refd)
Ong Chat Pang v Valliappa Cheldar [1971] 2 MLJ 224 (refd)
Ooi Yoke In (F) & Anor v Public Finance Bhd [1992] MLJU 25 (refd)
Royal Selangor Golf Club, The v Anglo-Oriental (Malaysia) Sdn Bhd [1990] 2 MLJ 163 (refd)
Tengku Maimun bte Tengku Seri Wa Raja & Anor v Commissioner for Religious Affairs, Terengganu & Ors [1969] 1 MLJ 110 (refd)

Legislation referred to

Contracts Act 1950 ss 24, 25
National Land Code ss 323, 332, 340
Rules of the High Court 1980 O 15 r 16
Specific Relief Act 1950 s 41

KB Tan (KB Tan, Kumar & Partners) for the plaintiff.
SY Lee (Mohd Noor & SY Lee) for the defendant.

Balia Yusof J:

[1] The plaintiff an Australian, and the defendant a Malaysian, were married in Australia in 1997 and subsequently had their marriage registered in Malaysia in 1999. In 2004 they were divorced. The plaintiff financed the purchase of a property, a single storey bungalow known as No 113, Jalan Chow Kai, Canning Garden, Ipoh, Perak and had it registered in the name of the defendant. By a trust deed dated 5 May 1999, it was declared that the whole of the purchase price of the said house was paid by the plaintiff and it was further declared that as consent in writing of the Foreign Investment Committee and the state authority of Perak are required for a foreigner to own property in Malaysia, the trust deed declares that the defendant holds the said property in trust of her husband, the plaintiff ('beneficiary') until such time the plaintiff obtains the said consent to register the same in the plaintiffs name. The trust deed further declares that upon obtaining the consent of the relevant authorities, the defendant will, at the request of the beneficiary transfer the said property to the beneficiary or sell or transfer the same to such other person or otherwise deal with the said property at such time and in such manner as the beneficiary shall direct.

[2] In a separate proceeding via Saman Pemula No 24–168 of 2003 the defendant obtained an order of custody and maintenance of the child of their marriage and also an injunction against the plaintiff from entering the said house No 113, Jalan Chow Kai Canning Garden, Ipoh until a further order is made. The said order was made by consent of the parties. In Divorce Petition No 33–452 of 2003 filed by the plaintiff, a consent order was also entered into between the parties whereby the plaintiff withdraws his claim

against the said property without prejudice to his right to file a claim in another separate action against the defendant. According to the plaintiff this was done purely to expedite the divorce proceedings.

[3] The plaintiff has now come to this court to seek for an order declaring that the defendant holds the said house No 113, Jalan Chow Kai, Canning Garden, Ipoh in trust for him in accordance with the terms of the trust deed dated 5 May 1999 and for a further order of vacant possession and that he be allowed to re-enter the said house and costs.

[4] At the outset, counsel for the defendant takes an objection saying that while an application for declaration may be made by an originating summons, the relief for vacant possession sought by the plaintiff should be heard by way of a writ in view of the fact that the issue is highly contestable and that an injunction is still in force against the plaintiff. The case of *Ng Kum Hoy v Bank Bumiputra Malaysia Bhd* [1990] 2 CLJ 69 which lays down that as a matter of procedural law an originating summons claiming a declaratory decree may be taken out for the determination of any question of construction arising out of a written instrument subject however to the court's discretion, after taking into account a variety of considerations, to decline to make a declaration especially where one of the considerations involves questions of fact which can only properly be resolved by the evidence of witnesses after a trial. While I subscribe to that view as expressed by LC Vohrah J in the said case, that situation does not arise in the present case before me here. From the affidavits filed by the parties herein, the facts are quite simple and straight forward and what is left for determination purely rests on the interpretation and construction of the trust deed dated 5 May 1999. The facts established in this instant case is not highly contestable at all. The filing of this application by way of originating summons is good in law.

[5] A declaration can be used to ascertain and determine the legal rights of parties or to determine a point of law. Section 41 of the Specific Relief Act 1950 makes provisions for a declaratory decree. It enacts that a person entitled to any 'legal character', or to any 'right as to any property', may institute a suit against any person denying, or interested to deny, his title to the 'character' or 'right'. At the same time O 15 r 16 of the Rules of the High Court 1980 gives a broader power to the court to issue declaration which is worded as follows:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declaration of right whether or not consequential relief is or could be claimed.

[6] PW Young in his book on *Declaratory Orders* (2nd Ed), defines a declaratory judgment as one that does not involve a cause of action in the usual sense and lists down six factors that must be characterized before there can be a declaratory order. The six are:

(1) There must exist a controversy between the parties.

(2) The proceedings must involve a 'right'.

(3) The proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as 'standing' or *locus standi*'.

(4) The controversy must be subject to the court's jurisdiction.

(5) The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims.

(6) The issue must be ripe, ie it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility.

[7] The power of this court to grant a declaratory order is a discretionary one and without limits. As Wan Sulaiman J in the case of *Tengku Maimun bte Tengku Seri Wa Raja & Anor v Commissioner for Religious Affairs, Terengganu & Ors* [1969] 1 MLJ 110 at p 112 adopted what was stated in *Barnard v National Dock Labour Board* [1953] 2 QB 18 at p 41 wherein it was stated:

> I know of no limits to the power of the court to grant declaration except such limits as it may in its discretion impose upon itself.

[8] The same was said by Viscount Radcliffe in *Ikebife Ibeneweka & Ors v Egbuna Peter & Anor* [1964] 1 AMR 219.

[9] Of course that discretion must be exercised judicially and consistent with accepted principles, and in the exercise of such discretion the court shall always have regard to the facts and circumstances of each particular case (*Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64, *Lim Cho Hock v Government of the State of Perak & Ors* [1980] 2 MLJ 149).

[10] The issue in the present case revolves on the construction of the trust deed. Upon construing the words of the trust deed, I found that the intentions of the parties are clear. Not only the trust deed declares that the said property was purchased by the plaintiff with his own money but it goes on to declare that because of the pending approval and consent of the relevant authorities, namely the Foreign Investment Committee and the Perak State Authority, the property is to be held by the defendant in trust of the plaintiff. The trust deed also further declares that the defendant trustee shall transfer

the said property to the plaintiff upon approval by the authorities and that the trustee shall also deal with the said property in such manner as the plaintiff shall direct. It was upon this understanding that the property was registered in the name of the defendant on 30 July 1999. The trust deed was executed on 5 May 1999 the very same day the property was purchased. They were done contemproneously.

[11] In *The Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163, Lim Beng Choon J said:

> In considering the disputes of the parties, I must first of all bear in mind the general principle of construction of contract as enunciated in the *National Coal Board v Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p 560:
>
> > The first two issues involves the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of the case are:
> >
> > (1) Construction of contract is a question of law;
> >
> > (2) Where the contract is in writing the intention of the parties must be found within the four walls of the contractual document, it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case);
> >
> > (3) A contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later;
> >
> > (4) The contract must be construed as a whole, and also, as far as possible, to give effect to every part of it.

[12] In *Central Bank of India v Hartford Fire Insurance Co Ltd* 1965 AIR 1288 SC, the Supreme Court of India laid emphasis on the second principle stated above namely on the intention of the parties when it says as follows at p 1290:

> Now it is common place that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[13] I would add that when the words used are clear and unambiguous it is not the court's business to go behind those written terms or read new terms to it.

[14] The same principle of construction is used in the construction of the trust deed in the instant case. In my considered view, there is not the slightest doubt about the intention of the parties. Both the plaintiff and the defendant were very conscious of the fact about the ownership of the property which was purchased on the very same day of the execution of the trust deed, and both know their relative positions, one being the trustee and the other the beneficiary of the trust.

[15] There was a feeble attempt by the defendant to challenge the trust deed when attempting to convince this court that she was not aware that she had in fact signed a trust deed. A case of mistake, may be. But she was aware and conscious of the purchase of the property in her name. It is not as plain as she might have thought. To borrow the words of Denning J in *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 All ER 631 at pp 469–470:

> ... his signature is irrefragable evidence of his consent to the contract, including the excepting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.

[16] Unfortunately, the defendant did not do anything further to support her claim and no evidence of any fraud or misrepresentation was ever proffered.

[17] To go even further, as aptly put by Abdul Malik Ishak J (as he then was) in *Ooi Yoke In (F) & Anor v Public Finance Bhd* [1992] MLJU 25 (at p 15):

> In short, when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial: (1) whether he has read the documents or not; (2) whether he knows no English and the contents were not explained to him.

[18] On the facts before me, I am far from being satisfied that the defendant does not know about the trust deed which she had executed. It is inconceivable to suggest that she does not know or understand the nature of the trust deed.

[19] The defendant also wanted the court to believe her that the consent order which she and the plaintiff entered into in the divorce proceeding was made without her knowledge. In the divorce petition filed by the plaintiff, among the reliefs he sought was the division of the property but this prayer was subsequently retracted by the plaintiff and through the said consent order it was agreed that the withdrawal of the claim was made without prejudice to the right of the plaintiff to file another civil suit for the same (exh BM5 in

encl 6). According to the plaintiff, the present action is the suit which was contemplated in the said consent order. I think I can accept the plaintiff's proposition. It is a fact that the defendant has changed solicitors and it is easy to allege that the previous solicitors has failed to inform her that the plaintiff's claim for the said property was withdrawn by consent. Reading the said order, I can only conclude that the defendant must have been aware and has consented to the order in the way it was framed. She had the advice of her counsel and she was also present in court. I cannot accept her contention that her solicitor had to consent to the said order. I hope she is not suggesting there was duress, coercion or undue influence on the solicitor for him to so act.

[20] The main objection of the defendant against the plaintiffs application is premised on the ground that the trust deed executed by the defendant on 5 May 1999 is void. It is strenuously contended by counsel for the defendant that the trust deed is against public policy and is therefore in contravention of s 24 of the Contracts Act 1950. What is public policy? Pollock and Mulla on *Indian Contract and Specific Relief Act*, 10th Ed, describes 'public policy' in the following terms:

> Public Policy — The principle of public policy is this: ex dolo molo non oritur action. Lord Brougham defines public policy as the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare.

[21] Needless to say, the guidelines and policies issued by the Foreign Investment Committee are meant for the general well being of the Malaysian citizen. It protects the general public interest and safe guard the public welfare. A breach of these guidelines will be injurious to the public welfare.

[22] It is alleged that the trust deed is intended to circumvent the government's policy of restricting foreign ownership of property. A number of authorities on illegal and void contract were referred to by the learned counsel for the defendant to support his contention: *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/oSurian Singh & Ors, Interveners)* [1996] 2 MLJ 431, *Fusing Construction Sdn Bhd v EON Finance Bhd & Ors* [2000] 3 MLJ 95, *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281; *Lo Su Tsoon Timber Duport v Southern Estate Sdn Bhd* [1971] 2 MLJ 161. These authorities go to show that any agreement which is in breach of ss 24 or 25 of the Contracts Act 1950 is illegal and any claim based thereon cannot be enforced.

[23] While agreeing with the submissions of the learned counsel on the point of law relating to illegal and void contracts, on a careful construction

of the trust deed I do not think that the trust is in contravention of the Foreign Investment Committee's guidelines. The ownership of the property is in the name of the defendant, a Malaysian citizen, and the clear words therein spell out that she is holding it in trust of the plaintiff. I do not see anything sinister about that. What the parties did in the instant case is merely to facilitate the transfer of the property pending the approval of the authorities. I do not think the deed was executed for an oblique purpose and neither was it a colourable device to deceive the authorities. A court of law will never lend its aid to a man who finds his cause of action upon an illegal act. Courts has always set their face against illegality in any contract and it matters not whether such illegality is pleaded or not and whether it is taken up at the court of first instance or at the appellate stage. There is nothing illegal about the execution of the trust deed in this case. What the plaintiff is seeking is merely for a declaration that he is the beneficiary of the trust. He is not asking for the transfer of ownership of the property. The trust so created was not a device to transfer the ownership of the property to the plaintiff who is a foreigner and prohibited by the guidelines. That being the case, I am therefore of the view that the trust is a lawful and valid trust.

[24] As stated earlier, the defendant has, through Originating Summons No 24–168 of 2003 filed claims against the plaintiff for the custody and maintenance of the child to their marriage and an order restraining the plaintiff from entering the said house until a further order is made. By a consent order dated 5 August 2003 (exh BM3 in encl 2) it was adjudged that the plaintiff be restrained from entering the said house No 113 Jalan Chow Kai Canning Garden Ipoh Perak, the subject property of this application. It was submitted before me that this court is precluded from making any order for vacant possession as prayed by the plaintiff in this application on the ground that there is an injunction against him from entering the said house. A short and simple reply to the defendant's contention will be as follows. As the said consent order says, the restraint on the plaintiff is only until a further order is made, and this instant application affords an instance for the making of such other order envisaged therein. It is entirely within my domain to make an order for vacant possession if the circumstances merit the making of such an order above and over the declaratory order as prayed in this application.

[25] Mr SY Lee, counsel for the defendant certainly made a commendable effort in trying to dissuade me from making any order in favour of the plaintiff. He put fourth a further argument by suggesting that the failure of the plaintiff to lodge a trust caveat under s 332 of the National Land Code must be taken as factor against him. Against this suggestion, learned counsel for the plaintiff was articulate enough to point out that there is a private caveat on the said land lodged by the plaintiff and the provisions of s 323 of

A the National Land Code entitles him to lodge the said private caveat being a person beneficially entitled under the trust. I am in full agreement with the plaintiff counsel's submissions on this point. Section 323(1)(b) of the Code provides that:

B 323(1). The persons and bodies at whose instance a private caveat may be entered are —

(a) …;

(b) any person or body claiming to be beneficially entitled under any C trust affecting any such land or interest; and

(c) …;

[26] The plaintiff is the beneficiary of the trust and is laying his claim D under it. He has an interest in the land. This judgment would be incomplete without reverting to s 340 of the National Land Code on the principle of indefeasibility of title, a point casually raised by the defendant. On her behalf it was submitted that her title to the said property is indefeasible. With respect, it would be a mistake to suggest that the principle of E indefeasibility of title is without exception. Certain equitable principles has long been recognized and applied to our Land Code. (*Haji Abdul Raman v Mohamed Hassan* [1415] 1 FMSLR 290, *Ahmad bin Omar v Haji Salleh bin Shaikh Osman* [1987] 1 MLJ 338). There is also what is known as deferred indefeasibility and this is the principle that is applicable in our laws relating F to land. As Anuar Zainal Abidin J stated in *Keng Soon Finance Bhd* at p 457:

> The revival of 'equity' is also seen in the Australian decisions which deny effect to unconscionable actions. In many cases unconscionability arises because there was inequality of bargaining power where one party to the contract suffered from a G disability, such as lack of education, or poverty; *Commercial Bank of Australia v Amadio* [1983] 57 ALR 158. The fact that in this case the purchasers were the subjects of protection under the consumer protection legislation, namely the HDA is a factor to be taken into account to allow a sympathetic application of equity in their favour *Stern v McArthur* [1988] 62 ALR 588.

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[27] To some, the expanding scope of the *in personam* exception to indefeasibility, guided by the notion of unconscionability, presents a further inroad into the principle of indefeasibility of title. Although this development seems to stem from an instinctive reaction that a purchaser with actual notice I of an unregistered interest should not be allowed to take free from it, there are sound reasons why equity should intervene.

[28] It should be noted that the expansion of equity in this way has been prominent in the Australian system of registration of titles where the principle

of immediate indefeasibility applies; *Frazer v Walker* [1967] All ER 649, *Breskvar v Wall* [1972] 46 ADR 68. Where the system of registration of titles is one of deferred indefeasibility (*Gibbs v Messer* [1891] AC 284) as it is in Malaysia (see *Ong Chat Pang v Valliappa Cheldar* [1971] 2 MLJ 224) there is no real barrier in principle to a generous application of equity subject to the provisions of National Land Code.

[29] Rights should not be lost in the 'welter of registration' — more so where equitable interests and equities are recognized in the Torrens System and National Land Code. The extension of the personal actions against purchasers with actual notice of unregistered interests reflects the changed social conditions which form the background to modern conveyancing. In the light of the changed conditions, it does not seem imperative to cling absolutely to the policy that prevailed in the 19th century.

[30] The law should be sufficiently flexible to protect those who have not, or are unable to arrange their affairs in a manner most beneficial to themselves. One aspect of the latest development in equity is the increasing penetration of equitable doctrines into contract and commercial law. If equity is willing to intervene in circumstances where resources abound, one might expect it to be more sympathetic towards parties less well endowed with resources.

[31] Admittedly, to introduce equity into the Torrens System and NLC entail uncertainties — whether it be uncertainties as to the type of conduct deplored, or uncertainties as to the status of one's title — but to demand too great a certainty in the law is to cry for the moon. The existing approach provides the system with a degree of flexibility necessary to meet the demands of a property-owning community. There is sufficient latitude within existing authorities to cater for this development and this is so especially where the nature of the Torrens System in Malaysia provides for deferred rather than immediate indefeasibility.

[32] From the facts, is very clear that the defendant is the registered owner of the land and the preamble to the trust deed declares that she is the purchaser of the said land. The trust deed further declares that the plaintiff was the one who financed the purchase of the property and is the beneficiary of the trust. He therefore has an interest in the property. In fact, he is the beneficial owner of the said property. Seen in that light, the defendant is a purchaser with actual notice of an unregistered interest of the plaintiff as what was described by the learned judge in the above stated passage. Equity should intervene in the circumstance, in favour of the plaintiff. As trustee, the defendant must strictly conform to and carry out the terms of the trust. It is also elementary that a trustee is a fiduciary and has an obligation towards the

A beneficiary as spelt out in the terms of the trust. The trustee must, amongst others, deal with the property in such manner as the beneficiary shall direct.

B **[33]** An order for vacant possession sought by the plaintiff does not contravene s 340 of the National Land Code. It does not affect the title of the defendant to the property and shall in no way be misunderstood to be giving ownership of the same to the plaintiff.

C **[34]** In conclusion, for the reasons as adumbrated above, the plaintiff's application is allowed in terms of prayers 1, 2, and 4 of encl 1. The plaintiff has earlier withdrawn prayer 3 for rental payment. The defendant is allowed a grace period of three months from the date of judgment to hand over vacant possession of the property to the plaintiff.

D *Order accordingly.*

Reported by Loo Lai Mee

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